IN THE

Supreme Court of the United States

October Term, 1975

No. .....

SUMITOMO FORESTRY CO., LTD.,
of Japan,
Petitioner,
v.
THURSTON COUNTY, WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS G. HOLCOMB
THOMAS G. HOLCOMB, JR.
Counsel for Petitioner

Office and Post Office Address:
2325 Financial Center
Seattle, Washington 98161

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

Page

I. Opinions Below 1
II. Questions Presented 3
III. Constitutional Provisions 3
IV. Statement of the Case 3
A. Agreed Facts 5
B. The Precedent 7
V. Conclusion 18
Appendices:
Appendix A A-1
Appendix B A-12
Appendix C A-13
Appendix D A-15
Appendix E A-22
Appendix F A-23

TABLES OF AUTHORITY

Table of Cases

A. G. Spalding & Bros. v. Edwards, 262 U.S. 66 (1923) 10, 11, 13, 14

Carrington Co. v. Dept. of Revenue, 84 Wn.2d 444, 527 P.2d 74 (1974) 4, 15, 16

Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929) 10, 11, 12, 13, 14, 15, 16

Coe v. Errol, 116 U.S. 517 (1886) 7, 8, 9, 13, 15

Cornell v. Coyne, 192 U.S. 418 (1904) 9, 13

Empresa Siderugica, S.A. v. County of Merced, 337 U.S. 154 (1949) 9, 13

Joseph v. Carter & W. Stevedoring Co., 330 U.S. 442 (1946) 10

	Page
Joy Oil Co. v. State Tax Commission, 337 U.S. 286 (1949)	9
Kosydar v. National Cash Register Co., ... U.S. ....., 40 L. Ed. 2d 660, 94 S. Ct. ..... (1974)	2, 9, 13
Puget Sound Stevedoring Co. v. Tax Commission, 302 U.S. 90 (1937)	9-10
Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946)	8, 12, 13, 14
Sumitomo Forestry v. Thurston Co., 504 F.2d 604 (1974)	2
Tacoma v. Gen. Metals of Tacoma, Inc., 84 Wn.2d 560, 527 P.2d 1314 (1974)	4, 16
Texas & N.O.R. Co. v. Sabine Tram Co., 227 U.S. 111 (1912)	10, 11, 12, 13, 14
Thames & M. Marine Ins. v. United States, 237 U.S. 19 (1915)	9
Turpin v. Burgess, 117 U.S. 504 (1886)	9, 13
United States v. Hvoslef, 287 U.S. 1 (1915)	9
Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938)	8

Constitutional Provisions

U.S. Const. art. I, § 10, cl. 2	3, 4

Statutes

28 U.S.C. § 1254	2
28 U.S.C. § 1331	3
28 U.S.C. § 1332	3

Annotations

67 ALR2d 1322	8

Other Authority

Rule 23	1

IN THE

Supreme Court of the United States

October Term, 1975

No. .....

SUMITOMO FORESTRY CO., LTD.,
of Japan,
Petitioner,
v.
THURSTON COUNTY, WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COMES NOW Sumitomo Forestry Co., Ltd. of Japan, a Japanese corporation (hereinafter "Sumitomo") and, pursuant to Rule 23, petitions this Court for a Writ of Certiorari to review the decision of the panel of the Court of Appeals for the Ninth Circuit in the above entitled matter.

I.

OPINIONS BELOW

On May 11, 1972, the District Court for the Western District of Washington, Walter T. McGovern, J., entered

judgment in favor of Sumitomo. A copy of the Judgment, together with the Findings and Conclusions in support thereof are appended hereto as Appendix A (A-1 through A-11). Thurston County, a legal subdivision of the State of Washington, thereafter perfected its appeal to the Court of Appeals for the Ninth Circuit. On June 12, 1974, the panel of the Ninth Circuit remanded this matter for reconsideration in light of the decision in *Kosydar v. National Cash Register Co.*, — U.S. —, 94 S.Ct. 2108, 40 L.Ed2d 660, (1974). A copy of the order is appended hereto as Appendix B (A-12). On July 2, 1974, Judge McGovern reaffirmed his earlier opinion and entered a Judgment on Remand in favor of Sumitomo. A copy of said Judgment is appended hereto as Appendix C (A-13, A-14). On October 8, 1974, a panel of the Ninth Circuit reversed the decision of the District Court. *Sumitomo Forestry v. Thurston Co.*, 504 F.2d 604 (1974). A copy of that decision is appended hereto as Appendix D (A-15 through A-21). Thereafter Sumitomo timely filed its request for a hearing en banc. On January 20, 1975, an order was entered denying the rehearing. A copy of the Order is appended hereto as Appendix E (A-22). On April 11, 1975, Sumitomo filed a motion to extend the time within which to file this petition, to May 20, 1975. Justice Brennan granted the motion on April 15, 1975 under Supreme Court Number A-837. A copy of said Order in Appended hereto as Appendix F (A-23).

Jurisdiction in the Supreme Court to review the decision of the Court of Appeals for the Ninth Circuit by Writ of Certiorari is given by 28 USC §1254.

II.

QUESTION PRESENTED

Was an *ad valorem* personal property tax assessed by Thurston County on certain logs owned by Sumitomo, a tax on exports and therefore violative of Article I, Section 10, Clause 2, of the United States Constitution?

III.

CONSTITUTIONAL PROVISIONS

Article I, Section 10, Clause 2 of the United States Constitution provides:

> "No State shall, without the consent of Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

While the imposition of the tax and its payment under protest involve certain Washington statutes, the parties have agreed that there has been full compliance with the requirements thereof. (A-2, ¶ V).

IV.

STATEMENT OF THE CASE

On January 1, 1970, Thurston County assessed an *ad valorem* personal property tax on export logs owned by Sumitomo. Sumitomo paid the tax under protest and began this action in the District Court for the Western District of Washington pursuant to 28 USC §1331 and 28 USC §1332 demanding the return of the tax paid. The case was presented to the Court upon an Agreed State-

ment of Facts which are identical to the Findings of Fact of the District Court. (A-1 to A-6).

The parties hereto have agreed that Sumitomo complied with all of the requirements of the applicable state law. (A-2, ¶V). Thus, this petition does not involve the interpretation of any local or state law. Nor was the tax assessed herein for the purpose of executing the inspection laws of the State.

The single issue presented is whether the logs were exports within the meaning of Article I, Section 10, Clause 2 of the Constitution and thus exempt from taxation. The decision of the panel of the Ninth Circuit is patently erroneous in that it establishes a novel test for export cases that has no precedent and further, overrules several decisions of this Court *sub silentio*. Also, the decision is directly contrary to the two most recent decisions of the Washington State Supreme Court. *Carrington Co. v. Dept. of Revenue*, 84 Wn.2d 444, 527 P.2d 74 (1974). *Tacoma v. Gen. Metals of Tacoma, Inc.* 84 Wn.2d 560, 527 P.2d 1314 (1974). It is respectfully submitted that this Court should issue a Writ of Certiorari and, after review, reverse the decision of the panel of the Ninth Circuit.

The final decision in this case will have a far-reaching impact on the actions of both taxpayers and the affected governmental agencies. The volume of goods being exported from this country has consistently increased and will undoubtedly increase in the future. While the case at bar involves only logs, both taxpayers and tax collectors will undoubtedly attempt to apply the final decision in this case to their individual situations. It is respectfully

submitted that the decision of the panel of the Ninth Circuit will inject additional confusion into an already complex area and can only result in further litigation.

In the interest of clarity this portion of the petition will be presented in two parts: First, a recital of the Agreed Facts which are most crucial to this decision. Second, an analysis of the precedent in the area and the effect of the Ninth Circuit decision on that precedent.

A. Agreed Facts

Sumitomo is a corporation organized under the laws of Japan, engaged in the purchase and sale of forest products. Its central office is in Tokyo, Japan. In furtherance of its business, Sumitomo purchased export quality logs from various sellers both within and outside of Thurston County, Washington, (A-2, ¶VI) Pursuant to purchase orders, the logs were brought from the forests by truck to the Port of Olympia. (A-2, ¶VI) On January 1, 1970, Thurston County assessed an *ad valorem* personal property tax on certain logs then at the Port property. As noted above, Sumitomo paid the tax under protest and then filed this lawsuit for its return in full compliance with the applicable state statutes. (A-2, ¶IV, V)

Each of Sumitomo's contracts with its suppliers in the United States required delivery of logs of "export quality". This is the most desirable quality of logs for any mill, either foreign or domestic. The logs must be free from defects and they are of a higher quality than is sold generally on the domestic market. At delivery, the seller has done all the sorting, scaling, loading and unloading. (A-3, ¶VIII)

It is submitted that Sumitomo's method of acquiring and transporting these logs requires a finding that they are "exports" no later than the time Sumitomo becomes the owner thereof. Sumitomo has never sold any logs in the United States. (A-5, ¶XIV) Sumitomo does not maintain any sales force in the United States nor does it have any customers in the United States. (A-2, ¶VII) The parties have agreed that the logs are accumulated at the Port of Olympia property solely to facilitate their exportation and not for possible domestic sales. (A-5, ¶XIV) Also, Sumitomo finances its purchases through Japanese banks and it is agreed that this method of financing commits the logs to delivery in Japan. (A-5, ¶XII) In fact, all the logs involved herein were exported to Japan. (A-2, ¶VI)

At the time of assessment, the logs in Olympia were already committed to Sumitomo's Japanese customers. The logs were purchased in this country specifically to fill the orders placed by the Japanese customers. (A-3, ¶VIII) Each year Sumitomo surveys its customers for their needs in the upcoming year. (A-2, ¶VII) Then the Tokyo office requires that the Seattle office purchase logs to fill these orders. (A-3, ¶VIII) Thus, the accumulation at Olympia was not made for the purpose of eventual resale. In effect, the logs are owned by Sumitomo's Japanese customers from the moment they are loaded aboard the trucks in the forest for delivery to Sumitomo in Olympia.

Sumitomo also controls the transshipment of the logs by ship to Japan. Sumitomo charters vessels for periods of three to five years specifically for the purpose of transporting these logs to Japan. (A-4, ¶IX) In the event that excess logs accumulate, Sumitomo hires "spot charters" to take

them to Japan. (A-4, ¶IX) This procedure is efficient enough so that the average turnover for this accumulation is 45 days. (A-5, ¶XI) Thus, Sumitomo is not only the foreign purchaser of the logs, but also is the carrier of the logs. The Ninth Circuit decision fails to mention this portion of the Agreed Facts.

In summary, the parties have agreed that the logs begin their actual movement when they are put aboard the trucks in the forest and begin their trip to Olympia. The sellers to Sumitomo have done all the sorting, scaling, loading and unloading upon delivery of the logs to Sumitomo at Olympia. (A-3, ¶VIII) The logs remain in Olympia only until sufficient quantities have been accumulated for shipment to Japanese customers. (A-3, ¶VIII)

Upon these Agreed Facts, the District Court held that the exportation process started when the trucks were loaded in the forest (A-6, C/L IV) and that the method of transshipment of the logs overseas necessitated the accumulation at the Port of Olympia. (A-6, C/L II)

B. The Precedent

Coe v. Errol, 116 U.S. 517 (1886) is the seminal case. There, residents of Maine owned logs which were stored on the banks of the Androscoggin River at the town of Errol, New Hampshire. The river has its headwaters in Maine and then continues through New Hampshire and finally back into Maine. All the logs were destined for Lewiston, Maine, for processing. The town of Errol assessed a personal property tax on all the logs. The New Hampshire court sustained the tax on those logs which had been cut in the town of Errol, but abated the tax on those logs which had been cut in Maine and had been

floated to Errol where they had been detained due to low water.

The Supreme Court sustained the ruling of the state court. As to the New Hampshire logs, the Court reasoned that:

> " . . . Although intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for someplace out of the state, or committed to the custody of a carrier for transportation for such place, why may they not be regarded as still remaining a part of the general mass of property in the State?" (116 U.S. at 526)

However, the Court also agreed that the tax on the logs which began their journey in Maine should be abated. As to those logs the Court held that:

> "Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation." (116 U.S. at 525)

Thus, *Coe* established two criteria which have been applied in the export cases.[1] Either the goods must have begun their actual movement in the course of commercial transportation or they must have been committed to the custody of a carrier for such transportation. It is submitted that the facts of the case at bar satisfy both of these

1. It must be noted that although *Coe* has been cited in virtually every export case, its facts were limited to transportation in interstate commerce. Since *Coe*, the Court has delineated a very clear distinction between the power of the states to tax interstate, as opposed to foreign commerce. A state may not assess *any* tax on goods in foreign commerce. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946); However, a nondiscriminatory tax that does not impose multiple burdens on goods in interstate commerce may be permitted. See *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); 67 ALR2d 1322.

criteria. At the time of the assessment of the tax, the logs had already begun their movement. They had been transported from the forest to the Port of Olympia by truck. Also, when the tax was assessed, the logs had been delivered into the custody of a carrier, Sumitomo, for their transshipment to Japan.

Since *Coe*, the court has been presented with a number of factual situations which have served to further define the criteria which must be met to invoke the protection of the Constitution. Goods are not exports while they remain at the place of manufacture. *Turpin v. Burgess*, 117 U.S. 504 (1886) (Tobacco assessed at factory); *Cornell v. Coyne*, 192 U.S. 418 (1904) (cheese assessed at factory); *Empresa Siderurgica, S.A. v. County of Merced*, 337 U.S. 154 (1949) (Tax assessed on portion of cement plant which remained at site of dismantling); *Kosydar v. National Cash Register Co., supra* (computers and business machines assessed while in storage at manufacturing plant). No matter how specialized the goods, movement away from the place of manufacture is essential.

Even after the movement has begun and the goods are in the course of transportation, there may not be an overlong delay at any break in that transportation. *Joy Oil Co. v. State Tax Commission*, 337 U.S. 286 (1949) (delay of fifteen months).

The prohibition against taxation on exports has been extended to the acts deemed an essential attribute of foreign commerce. *Thames & M. Marine Ins. v. United States*, 237 U.S. 19 (1915) (stamp tax on policies of marine insurance); *United States v. Hvoslef*, 237 U.S. 1 (1915) (stamp tax on charter parties); *Puget Sound Stevedoring Co. v.*

Tax Commission, 302 U.S. 90 (1937) and *Joseph v. Carter & W. Stevedoring Co.*, 330 U.S. 442 (1946) (general business tax on stevedoring business).

Other cases have served to more carefully define situations that are entitled to the protection of the Constitution. One of the earliest cases was *Texas & N.O.R. Co. v. Sabine Tram Co.*, 227 U.S. 111 (1912). The Tram Company manufactured lumber within Texas which it sold to W. A. Powell & Company, an exporter. The contract provided that the Tram Company deliver the lumber f.o.b. the cars at the Port at Sabine, Texas. Powell had contracts with European purchasers for the delivery of this lumber and had chartered vessels to carry the lumber from Sabine, Texas to Europe. The issue was whether the shipment by rail from the plant to the Port was intrastate or foreign commerce. The rate structure was different for the two kinds of commerce.

This Court held this was a shipment in foreign commerce.

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial." (227 U.S. at 126)

While the case did not deal with a tax on the lumber, it has been cited with approval in two subsequent cases that dealt specifically with the issue of a tax. *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923); *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929)

In *Spalding*, a Venezuelan company placed an order with an exporter for baseballs and bats. The exporter then placed an "export order" with Spalding which specified that the goods were to be delivered to an exporting carrier in New York. The goods were delivered as foreseen by the order. The United States assessed a sales tax on the transfer to the carrier, but before the goods were put aboard a ship. A unanimous Court struck down the tax. Justice Holmes reasoned that:

> "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result." (262 U.S. at 69, 70)

Thus, the delivery of the goods to the exporting carrier was held to be the act which commenced the process of exportation. The Court cited *Sabine* in support of the position that changes in the method of transportation do not necessarily affect the process of exportation.

In *Carson*, the Court again addressed the issue of taxation of goods in the export stream. There, the oil company purchased gasoline to fill European orders. The gasoline was brought by tank car to a port in Louisiana which was specially suited for exportation. The gasoline was then pumped into tanks where it was stored until a ship arrived. The gasoline was of a higher grade than was used in this country generally. The Court struck down an *ad valorem* personal property tax on the gasoline finding that it

was an export while in the storage tanks. The Court held that the *Sabine* case could not be distinguished and held that there was a continuous export journey which began when the tank cars were loaded. The storage at the Port was held to be a necessary and reasonable interruption in the journey and did not alter the character of the export journey.

In *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946) the government of New Zealand purchased a quantity of oil to be delivered f.o.b. Los Angeles to a steamer in the Navy of New Zealand. Richfield piped the oil from their refinery in California to storage tanks at the port. Upon the arrival of the steamer, the oil was pumped from the tanks into the hold of the steamer. California assessed a sales tax on the transfer to the steamer. The Court concluded that the tax was unconstitutional. Justice Douglas reasoned that:

> " . . . [W]hen the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain.
>
> "It seems clear under the decisions which we have received . . . that the commencement of the export would occur no later than the delivery of the oil into the vessel . . ." (329 U.S. at 83)

The Court cited *Carson* in support of its conclusion.

The decision of the panel of the Ninth Circuit is a clear departure from this precedent. The logs herein were taxed

while in the ownership and control of the foreign purchaser. In *Sabine, Spalding, Carson* and *Richfield*, the delivery of the goods to the foreign purchaser, or its agent, was held to be the critical step in the process of exportation. In *Coe, Turpin, Cornell, Empresa* and *Kosydar*, this Court held that the goods must begin their actual movement away from the place of manufacture. At the time Thurston County assessed its tax on the logs herein, the said logs had previously been transported from the forest, the place of manufacture, to the Port of Olympia and were in the ownership and control of the foreign purchaser, Sumitomo. The Agreed Facts show that the actual physical movement of the logs in the export stream had begun; however, the Ninth Circuit opinion ignores this fact and then goes on to apply the "movement" standard of *Coe* to the case at bar. That opinion ignores the criteria established by the cases following *Coe* and, in so doing, expands and redefines the criterion of *Coe*. The effect of the decision of the Ninth Circuit is to overrule *sub silentio* the decisions in *Sabine, Spalding, Carson* and *Richfield*.

The opinion of the Ninth Circuit very clearly applies *Kosydar v. National Cash Register Co., supra*, to the facts of the case at bar. Yet, *Kosydar* and the present facts are completely dissimilar. First, in *Kosydar*, the manufacturer still owned the machines. Here the logs have been sold to the foreign purchaser. Secondly in *Kosydar*, the goods were still at the place of manufacture. In the case at bar the logs had already been transported from the forests, the place of manufacture, to the port. In *Kosydar*, the taxpayer argued that where the goods were non-fungible and could only be used in foreign countries, that there existed a certainty of export and therefore the goods were exports. In

the case at bar, no such rationale could be applied. The logs herein had begun their export journey. In *Richfield* and *Spalding*, the Court held the delivery to the foreign purchaser to be the critical step. The Ninth Circuit distinguishes both cases:

> "... [the logs] had neither been committed to a common carrier for export, [citing *Spalding*] nor loaded aboard the ship that would take them to Japan, [citing *Richfield*]" (504 F.2d at 607)

In fact, *Richfield* clearly states that there need not be a delivery to a common carrier and *Spalding* clearly indicates that the goods need not be actually loaded aboard ship.

The case which appears to control is *Carson Petroleum Co. v. Vial, supra*. There the oil was taxed while in storage tanks. The oil had been brought to the port under export directions and was especially suited for foreign use. The Ninth Circuit seeks to distinguish *Carson* solely on the ground that the oil had come to the port from other states while Sumitomo's logs had come from inside Washington. Yet, in *Sabine*, *Richfield* and *Spalding*, the goods had come from locations wholly within the taxing state. Thus, the Ninth Circuit has erected a novel test which ignores the *Sabine* case altogether and ignores the conflict between its interstate test and *Richfield* and *Spalding* wherein there was no prior interstate journey.

The decision below would apparently be different if Sumitomo's logs had come from the forests of Oregon or Idaho rather than Washington. It is submitted that such a distinction is illogical and difficult to apply.

Consider the following hypothetical: Assume that an

owner of goods receives a purchase order from a Japanese customer. The owner manufactures the goods in Cathlamet, Washington. Cathlamet is 25 miles east of Astoria, Oregon and 25 miles west of Longview, Washington. The goods could be taken by common carrier to the ports at either Astoria or Longview for transshipment to Japan. The Ninth Circuit would find that *Carson* would apply to goods in Astoria, but not in Longview. In effect, the state line would become a magic wand which would change the character of the commerce. Such a result is illogical and unjust. The goods are clearly exports the moment they move away from Cathlamet towards the port.

Further, consider the problems for the tax collector at a port when he is presented with a pile of scrap iron bound for overseas at the port. What is the result if some has come from his state and the remainder from other states? What of the situation where goods are brought in from another state, mixed with identical goods from in state, at a location which is some distance from the port, then taken to shipside when a sufficient quantity has accumulated? Under *Coe* and its progeny, the goods acquire the status of exports only after they have begun their actual movement toward foreign shores or been committed to a carrier for that transportation. Yet under the decision below, they would have to have also touched a state line.

The decision of the Ninth Circuit also clearly contradicts the two most recent decisions of the Washington Supreme Court. In *Carrington Co. v. Dept. of Revenue*, 527 P.2d 74 (1974), goods were delivered via truck from a warehouse in Seattle to a packing facility in Tacoma, Washington. The Washington Court held that the export journey began when the trucks left Seattle and struck down a

tax assessed after that time. The Court cited *Carson* in support of its decision. In *Tacoma v. Gen. Metals of Tacoma, Inc.*, 527 P.2d 1314 (1974) scrap metal was accumulated at a port and then loaded aboard ships bound for foreign shores. The scrap was purchased from various domestic sources. The Washington Court held that the export journey had begun when the scrap was put aboard the ship and therefore the tax assessed at that time was violative of the Constitution. Neither *Carrington* or *Tacoma* involved a prior interstate journey and *Carson* was held to be applicable. Thus, a clear conflict exists between these decisions and the decision of the Ninth Circuit.

Finally, while the final decision will undoubtedly affect the actions of both tax collectors and exporters in the future, it will have an immediate effect on many cases with similar facts which are presently pending in state court and federal district court in the State of Washington. A partial listing of those cases is as follows:

Sumitomo Shoji America, Inc. v. Thurston County, Washington	State court
Sumitomo Shoji America, Inc. v. Cowlitz County, Washington	State court
Sumitomo Shoji America, Inc. v. Wahkiakum County, Washington	State court
Sumitomo Shoji America, Inc. v. Grays Harbor County, Washington	State court
Sumitomo Shoji America, Inc. v. Pierce County, Washington	State court
Mitsubishi International Corp. v. Pierce County, Washington	U.S. District Court
Mitsubishi International Corp. v. Cowlitz County, Washington	U.S. Distirct Court

Mitsubishi International Corp. v. Pierce County, Washington	U.S. District Court
Nicimen Co., Inc. v. Pierce County, Washington	U.S. District Court
Nicimen Co., Inc. v. Snohomish County, Washington	U.S. District Court
Toyomenka (America) Inc. v. Thurston County, Washington	U.S. District Court
Wasser & Winters v. Pierce County, Washington	U.S. District Court
Wasser & Winters v. Pierce County, Washington	State court
Sanyo-Kokusaku Pulp Co., Ltd. of Japan et al v. Snohomish County, Washington	U.S. District Court
Sanyo-Kokusaku Pulp Co., Ltd. of Japan et al v. Clallam County, Washington	U.S. District Court
Sanyo-Kokusaku Pulp Co., Ltd. of Japan et al v. Pierce County, Washington	U.S. District Court
Sanyo-Kokusaku Pulp Co., Ltd. of Japan et al v. Thurston County, Washington	State court
Ataka America, Inc. v. Clallam County, Washington	U.S. District Court
Ataka America, Inc. v. Snohomish County, Washington	U.S. District Court
Dant & Russell Inc. and Ataka America, Inc. v. Clallam County, Washington	State court
Kanematsu Gosho (U.S.A.) Inc. v. Snohomish County, Washington	U.S. District Court

Kanematsu Gosho (U.S.A.) Inc. v. Pierce County and Pacific County, Washington	U.S. District Court
Pacific Timber Exchange Corporation v. Pacific County and Grays Harbor County, Washington	State court

Some of these cases have been formally stayed by court order pending the outcome of the case at bar.

V.

CONCLUSION

It is respectfully submitted that the decision of the panel of the Ninth Circuit is erroneous and that it will have a continuing deleterious effect on export cases if allowed to stand.

Sumitomo prays that a Writ of Certiorari issue for the purpose of thoroughly reviewing that decision.

Respectfully submitted,

THOMAS G. HOLCOMB
THOMAS G. HOLCOMB, JR.
Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON AT SEATTLE

SUMITOMO FORESTRY CO., LTD., of Japan, *Plaintiff*, v. THURSTON COUNTY, WASHINGTON, a legal subdivision of the State of Washington, *Defendant*.	No. 9667 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE ABOVE ENTITLED ACTION came on for trial before the Court without a jury, the plaintiff appearing by its attorney, Thomas G. Holcomb, and the defendant appearing by its attorney, William F. Britton, and the Court having been duly advised in the premises, now makes and files the following:

FINDINGS OF FACT

I.

Sumitomo Forestry Co., Ltd. is a corporation organized pursuant to the laws of Japan.

II.

Thurston County is a legal subdivision of the State of Washington, organized pursuant to the laws of the State of Washington.

III.

Thurston County claims that $39,460.88 is due from Sumitomo Forestry Co., Ltd. for personal property taxes levied on or about January 1, 1971 on logs owned by Sumitomo and located within Thurston County, Washington on or about January 1, 1970. Thurston County assessed said logs on or about January 1, 1970. Attached hereto, and marked Exhibit A is an exact copy of the "Personal Property Tax Statement" sent by Thurston County to Sumitomo billing $39,460.88 for personal property

taxes assessed and levied on the logs described above in this paragraph.

IV.

Sumitomo timely and properly objected to the levy described herein on the grounds that the logs described above were exempt from taxation by Thurston County under Article 1, Section 10, Clause 2 of the United States Constitution.

V.

On or about, but no later than April 30, 1971 Sumitomo paid to Thurston County $19,730.44 under written protest and in compliance with all the requirements of Washington law for bringing this lawsuit for the refund of the said tax.

VI.

At all times material to the case at bar, Sumitomo has engaged in the business of purchase and sale of forest products in Japan and of procuring logs for this purpose from the State of Washington. The acquisition of such logs has been carried on both within and outside the limits of Thurston County, Washington. Said logs are stored in an area within the control of the Port of Olympia for the eventual purpose of export to Japan. All logs owned by Sumitomo as of January 1, 1970, and assessed as of that date, have in fact, been exported to Japan.

VII.

In June, July and August of each year, Sumitomo makes a survey of all of its customers in Japan to determine the orders which will be placed by these customers for the next year. All of the customers of Sumitomo are Japanese companies. Approximately eighty percent of Sumitomo's business is done with ten companies:

SHIMIZU MOKUZAI SANGYO KYODO KUMIAI
ICHIJO MOKUZAI
TSUJII MOKUZAI K.K.
KOYO SEIZAI K.K.
SHIOTA KENSETSU K.K.
KIRIN MOKUZAI K.K.

MINOYA MOKUZAI K.K.
GOSHI GAISHA FUCHIWAKI MOKUZAI-TEN
IMARI GAIZAI K.K.
FUKUSHIMA-KEN GAIZAI K.K.

Because most of the sales made by Sumitomo are to companies who have purchased from them before, Sumitomo is able to estimate, with reliable accuracy, the volume of their sales in any given year. All sales are negotiated and consummated in Japan. Based on these orders, Sumitomo then requires its Seattle office to purchase logs which equal approximately 110% of the orders. The extra 10% is to account for those unavoidable problems which necessarily arise when dealing with a semi-perishable commodity. This practice is followed by Sumitomo when purchasing logs in other parts of the world such as New Zealand, Indonesia and other areas from which they are imported. Sumitomo does not have any customers within the United States and the Seattle office did not have a sales force.

VIII.

Sumitomo enters into contracts with various companies in the United States for purchase of logs to fill orders placed by its customers in Japan. Without exception, these contracts provide for certain quantities of logs which must be of export quality. By export quality, is meant that these logs are free from certain defects such as curvature, closely spaced knots, heart checks, scars, rot or insect infestations. This is the most desirable quality of log for any lumber mill, foreign or domestic. These contracts provide that the logs are to be delivered f.o.b. at the Airport Yard of the Port of Olympia. The logs are delivered to the Airport Yard where they are stored in piles of approximately 250,000 board feet each. At this point, the seller has done all the sorting, scaling, loading and unloading, with the exception that these logs are not sorted as to lengths. The logs are held in the Airport Yard until a sufficient quantity has been accumulated for shipment to a particular customer. After a sufficient number of logs have been accumulated to fill the orders of customers for these specific logs, Sumitomo advises the Port of Olympia that certain logs are to go from the Airport Yard to the dockside area to be prepared for shipping. The Port then hires trucks

to transport the logs to the dockside area where the logs are loaded in a way which will facilitate delivery to the customers in Japan.

This procedure is followed for all its suppliers except St. Regis. A contract for the purchase of logs from St. Regis is made in Tokyo each year to fill orders by the customers of Sumitomo. Because St. Regis has its own storage yard, the logs are accumulated at their yard and are sorted by St. Regis. Sumitomo hires trucks to carry these logs from St. Regis to the dockside area. When the loaded trucks arrive at dockside, they are sent to the correct area for loading on specific vessels for customers in Japan.

IX.

The vessels used for transport to Japan are chartered by Sumitomo for periods of not less than three years and not more than five years with the exception that Sumitomo may hire ships as "spot charters" to take care of any excess logs which have been stored over a period of time. The Tokyo office makes these charters for the estimated volume that will occur over that period of time. At the present time, nine ships are chartered which make a total of approximately 65 round trips each year. Sumitomo has a shipping assignment meeting, in Tokyo every three months for the purpose of adjusting the shipping schedule to account for the needs of customers and any extraordinary events which may have occurred. At this meeting, Sumitomo sets the ship, the destination and the quantity and quality of the logs to be shipped. There is an additional meeting each month to take care of rerouting, strikes, shutdowns, or other emergencies such as shipping difficulties relating to a particular customer. The ships are directed to the port in the United States where the particular customer's order as to species, quality, and length can be filled. The local branch of Sumitomo is given notification at least two weeks before the expected date of arrival. The shipment is then made directly to Japan at the port of the customer.

X.

It is necessary to have the logs loaded aboard ship in a way that will allow the customer in Japan to accept delivery of the logs at shipside. This necessitates the storage of orders from domestic sellers at the Port of Olympia yard and St. Regis yard. Also, because of the nature of transporting logs by ocean going vessel, it would be uneconomical and inefficient to have the vessel stand at the dock while various purchases were made.

XI.

It has been reliably estimated that the average inventory turnover of Sumitomo is 45 days; however, any individual log may be in storage for a much shorter period of time or may remain in the yard for a period which may be as long as one year.

XII.

All purchases by Sumitomo are made pursuant to credit arrangements made by Sumitomo with either the Bank of Tokyo or the Bank of Sumitomo in Japan. Payments to the sellers are made by the bank upon receipt or proof that the logs have been delivered to Sumitomo. When the logs are delivered to the customer in Japan, Sumitomo receives documents showing this delivery and these documents are then sent to the bank which applies a credit on Sumitomo's account. All financing of Sumitomo's operation in the United States, is done through the Tokyo office by letters of guaranty, commercial letters of credit or conventional letters of credit. All logs are committed to delivery in Japan to obtain this type of financing.

XIII.

All logs purchased by Sumitomo are of export quality. Sumitomo does not purchase an entire stand of trees. All selection and sorting is done by the seller.

XIV.

The inventory maintained by Sumitomo at the several Port of Olympia log storage areas is established for the purpose of facilitating its method of export and not for possible sale on the local market; in fact, Sumitomo has never sold any logs from that inventory to any purchaser within the United States.

XV.

The inventory maintained in the several storage areas established by the Port of Olympia is substantial; the inventory must be sufficient to provide for full shipments and allow for seasonal interruptions of delivery of logs to the storage areas.

Weather conditions such as snow and ice in the winter and heat in the summer cause seasonal variations in the ability of ships to enter the Port and the ability of logging operations to deliver logs to the Port.

XVI.

Attached hereto as Exhibit B is a graph showing the approximate level of that inventory in Scribner board feet during the period before and after January 1, 1970, the assessment date. The Port of Olympia supplied these figures.

Upon the above Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

I.

This Court has jurisdiction of the cause of action under the provisions of 28 USC §1331 and 28 USC §1332.

II.

That the accumulation of the logs by Sumitomo, at the Port of Olympia, was a necessary interruption to the process of exportation due to the necessities of exportation by ocean going vessel.

III.

That the accumulation of logs by Sumitomo, at the Port of Olympia, did not occur over an unreasonable length of time.

IV.

That the exportation process starts at the time that the

logs are loaded on the trucks in the forest and that it certainly begins no later than the time these logs are delivered to Sumitomo at Olympia, Washington.

V.

That the personal property tax levied by the defendant was upon plaintiff's logs while they were in the process of exportation and that therefore, said tax levy was unconstitutional under Article 1, Section 10, Clause 2 of the United States Constitution.

VI.

That plaintiff, Sumitomo Forestry Co., Ltd. of Japan, have judgment against the defendant, its officers and all its representatives, for $19,730.44, together with interest thereon at the legal rate as provided by RCW 84.68.030 and for costs incurred herein, as provided for by RCW 84.68.030.

Let Judgment be entered accordingly.

DATED this 12th day of May, 1972.

s/WALTER T. McGOVERN
WALTER T. McGOVERN, *Judge*
United States District Court

COPY RECEIVED:

s/WILLIAM L. BRITTON
Deputy Prosecuting Attorney
Attorneys for Defendant

SUBMITTED BY:

s/THOMAS G. HOLCOMB
Attorney for Plaintiff

A-8

BEST COPY AVAILABLE

REMIT TO: GEORGE M. HASKETT
THURSTON COUNTY TREASURER
OLYMPIA, WASHINGTON

PERSONAL PROPERTY TAX STATEMENT

THURSTON COUNTY, WASHINGTON

1971

TAX CODE	RATE OF LEVY	CLASSIFICATION OF BUSINESS	ASSESSED VALUE	TOTAL 1971 TAX	FIRST HALF TAX DUE APRIL 30TH	SECOND HALF TAX DUE OCTOBER 31ST
110	41.06		961,054	39,460.88	19,730.44	

Personal Property Taxes are a lien upon all Real and Personal Property of the Person Assessed from Date of Assessment until Paid, and if Not Paid, it becomes Subject to Distraint and Foreclosure as Provided by the Revenue Laws of the State of Washington.

FIRST HALF OR TOTAL TAX DUE BY APRIL 30 — 2nd HALF DUE BY OCTOBER 31
AFTER APRIL 30, — FULL TAX PLUS INTEREST DUE

DETAIL NUMBER 3802

DELINQUENT TAX RATE 10% PER ANNUM

YR.	DETAIL	DELINQUENCY	COSTS	INTEREST	TOTAL
71					
70					
69					
68					
67					
66					

1970 ASSESSMENT

If this property is sold, contact the Treasurer's Office for Payment of Advance Taxes.

SUMITOMO FORESTRY CO
3922 SEA FST NATL BANK BLDG
SEATTLE WA 98104

YOUR TAX DOLLARS WILL BE DISTRIBUTED TO THE FOLLOWING DISTRICTS

CITY OR ROAD DISTRICT		SCHOOL DISTRICT		FIRE AND CEMETERY		LIBRARY	STATE	PORT	COUNTY
OLY	8,755.20	111	21,469.95				4363.19	1028.32	3344.22

Interest Figured To:
Amount Due
Total Paid

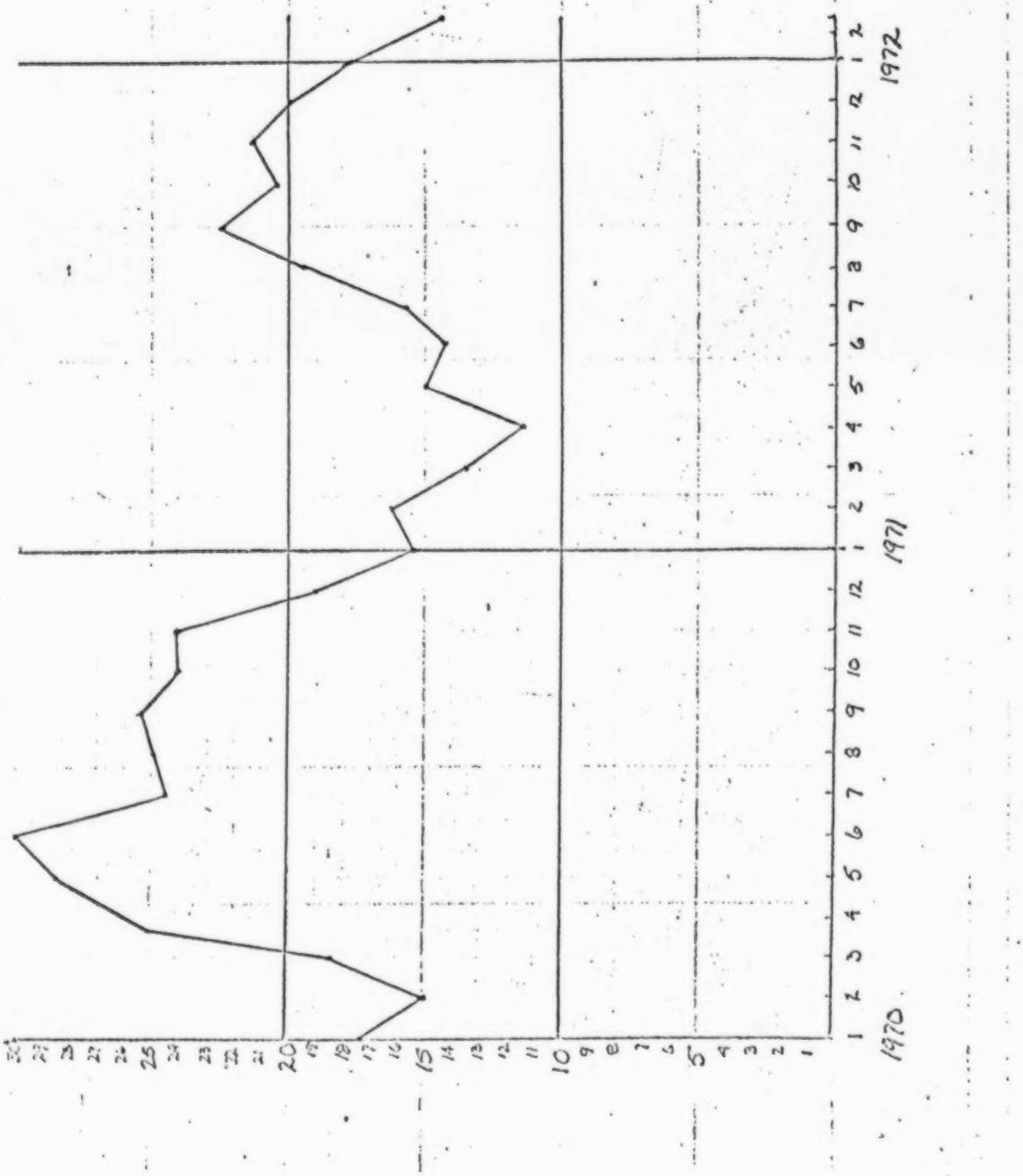
WARRICK'S QUICK PRINT - OLYMPIA

EXHIBIT A

A-8

b7

EXHIBIT B


1970
1971
1972
1 2 3 4 5 6 7 8 9 10 11 12 1 2 3 4 5 6 7 8 9 10 11 12 1 2
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON AT SEATTLE

SUMITOMO FORESTRY CO., LTD., of Japan, *Plaintiff,* v. THURSTON COUNTY, WASHINGTON, a legal subdivision of the State of Washington, *Defendant.*	No. 9667 JUDGMENT

THE ABOVE ENTITLED ACTION came on for trial before the undersigned Judge of the above entitled court, sitting without a jury, the plaintiff appearing by its attorney Thomas G. Holcomb, and the defendant appearing by its attorney William F. Britton, Deputy Prosecuting Attorney, and the Court having been fully advised in the premises, having heard argument of counsel and having entered its Findings of Fact, Conclusions of Law and Order for Judgment in this cause,

And it appearing therefrom that the issues herein should be found for the plaintiff and that it should have judgment as demanded in its complaint, being the sum of $19,730.44 with interest at 5% per annum from April 30, 1971 until paid,

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff herein, Sumitomo Forestry Co., Ltd., have and recover of and from the defendant, Thurston County, Washington, its officers and all its representatives, the sum of $19,730.44 as principal and interest thereon at 5% per annum from April 30, 1971 until the date of payment of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover its costs of suit herein to be taxed.

DATED this 12th day of May, 1972.

s/WALTER T. McGOVERN
WALTER T. McGOVERN, *Judge*
United States District Court

COPY RECEIVED:

s/WILLIAM L. BRITTON
Deputy Prosecuting Attorney
Attorney for Defendant

SUBMITTED BY:

s/THOMAS G. HOLCOMB
Attorney for Plaintiff

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUMITOMO FORESTRY CO., LTD., of Japan, *Plaintiff-Appellee,* v. THURSTON COUNTY, WASHINGTON, a legal subdivision of the State of Washington, *Defendant-Appellant.*	Filed June 12, 1974 Clerk U.S. Court of Appeals No. 72-2395 ORDER OF REMAND

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and WILLIAMS, District Judge.*

Following oral argument, submission of the appeal was vacated pending the decision in *Kosydar v. National Cash Register Co.* by the Supreme Court. The opinion therein was filed on May 20, 1974 (42 L.W. 4767).

The judgment of the district court is vacated in light of the decision in *Kosydar v. National Cash Register Co.*, and the cause is remanded for reconsideration.

EUGENE A. WRIGHT
Circuit Judge

Circuit Judge

District Judge

DATED:

*Of the Northern District of California.

APPENDIX C

UNITED STATES DISTRICT COURT, WESTERN
DISTRICT OF WASHINGTON

SUMITOMO FORESTRY CO., LTD., of Japan, *Plaintiff,* v. THURSTON COUNTY, WASHINGTON, a legal subdivision of the State of Washington, *Defendant.*	No. 9667 JUDGMENT ON REMAND

THE ABOVE ENTITLED ACTION came on for trial before the undersigned Judge of the above entitled court, sitting without a jury, the plaintiff appearing by its attorney, Thomas G. Holcomb, and the defendant appearing by its attorney, William L. Britton, Deputy Prosecuting Attorney, and the Court having been fully advised in the premises, having heard argument of counsel and having entered its Findings of Fact, Conclusions of Law and Order for Judgment in this cause,

And it appearing therefrom that the issues herein should be found for the plaintiff and that it should have judgment as demanded in its complaint, being the sum of $19,730.44 with interest at 5% per annum from April 30, 1971, until paid, and the Court having received the remand and mandate from the United States Court of Appeals for the Ninth Circuit and recognized its previous decision as affected by *Kosydar v. National Cash Register Co.*, 42 L.W. 4767 (1974), as directed by the United States Court of Appeals for the Ninth Circuit,

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff herein, Sumitomo Forestry Co., Ltd., have and recover of and from the defendant, Thurston County, Washington, its officers and all its representatives, the sum of $19,730.44 as principal and interest thereon at 5% per annum from April 30, 1971, until the date of payment of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover its costs of suit herein to be taxed.

DATED THIS 2nd day of July, 1974.

s/WALTER T. McGOVERN
WALTER T. McGOVERN, *Judge*
United States District Court

PRESENTED BY:
THOMAS G. HOLCOMB
Attorney for Plaintiff

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

SUMITOMO FORESTRY CO., LTD. OF JAPAN, *Plaintiff-Appellee,* v. THURSTON COUNTY, WASHINGTON, a legal subdivision of the State of Washington, *Defendant-Appellant.*	No. 72-2395 October 8, 1974.

Before HUFSTEDLER and WRIGHT, Circuit Judges, and WILLIAMS,* District Judge.

OPINION

EUGENE A. WRIGHT, Circuit Judge:

In this case we must decide whether Thurston County, Washington, may impose an *ad valorem* tax on logs stored at the Port of Olympia awaiting ships for transportation to Japan. The district court held that the logs were in the process of exportation and that the tax was, therefore, a state imposed duty on exports prohibited by Article I, Section 10, Clause 2, of the United States Constitution.[1] Following the submission of the appeal, we vacated our action pending the Supreme Court's disposition of Kosydar v. National Cash Register Co., ... U.S. ....., 94 S.Ct. 2108, 40 L.Ed.2d 660 (1974). After the opinion therein was filed, we vacated the judgment of the district court and remanded for reconsideration in light of the decision in *Kosydar*. The district court concluded that *Kosydar* did not affect its earlier disposition. We disagree, and reverse with directions to the district court to enter judgment in favor of appellant Thurston County.

The parties submitted the case on stipulated facts. Sumi-

1. No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . .

tomo is a foreign corporation which imports logs to Japan. Each summer it takes orders from its Japanese customers and buy logs to meet demand.[2] The logs in issue were purchased in Washington state and delivered to Sumitomo f.o.b. the Port of Olympia. The seller performed all sorting, scaling, loading, and unloading of the logs except they were not sorted by length at delivery. The logs were then stored in a storage yard at the port awaiting ships to take them to Japan.

In order to load ships efficiently as they arrived at the port, Sumitomo continuously had a supply of logs on hand in the storage area. The average turnover was 45 days, although specific logs may have stayed in the storage area for a shorter or longer period of time. All logs were stored only as long as necessary to await arrival of a ship upon which they could be loaded. Sumitomo sold no logs domestically, and the financial arrangements, the company's past practices, and the type of logs purchased indicated with reasonable certainty that the logs would be exported.

The issue on appeal is whether the county may levy an *ad valorem* tax on logs stored by Sumitomo at the Port of Olympia awaiting shipment. We hold that it may.

Although Article I, Section 10, Clause 2, of the Constitution prohibits a state from imposing a duty on exports, property within the state is not exempt from taxation solely because it may be exported in the future. *See, e. g.*, Empresa Siderurgica, S.A. v. Merced County, 337 U.S. 154, 69 S.Ct. 995, 93 L.Ed. 1276 (1949). The exemption from taxation attaches only after the property has entered the export process. The problem is to define the point at which that process begins. Kosydar v. National Cash Register Co., ... U.S. ....., 94 S.Ct. 2108, 40 L.Ed.2d 660 (1974). Appellant county contends that the logs do not begin the export process until they are loaded on the ship to be transported to Japan. Appellee Sumitomo argues that logs stored at the port awaiting the first avail-

2. Sumitomo's purchases exceeded orders by 10%, but this was merely "to account for those unavoidable problems which necessarily arise when dealing with a semi-perishable commodity."

able ship have begun the export process and are exempt from taxation.

Sumitomo's position must be rejected as it is contrary to the holding in Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715 (1886). In *Coe* the Court was concerned with the point at which goods enter the stream of interstate commerce and thereby become protected by the Interstate Commerce Clause from certain local taxation. Although *Coe* dealt with the Interstate Commerce Clause, its standard for the point at which goods commence an interstate journey has been explicitly adopted to determine the point at which goods commence a foreign journey and thereby become "exports" under Article I, Section 10, Clause 2. Kosydar v. National Cash Register Co., *supra*, at ....., 94 S.Ct. 2108; Empresa Siderurgica, S.A. v. Merced County, *supra* at 156, 69 S.Ct. 995; Richfield Oil Corp. v. State Board, 329 U.S. 69, 79, 67 S.Ct. 156, 91 L.Ed. 80 (1946).

Applying the *Coe* standard to Sumitomo's logs, it is clear that they had not yet become "exports" immune from local taxation when the *ad valorem* tax was levied. In *Coe* the Court considered two collections of logs. The first had been cut in Maine and floated down the Androscoggin River enroute to another location in Maine. The course of the River took the logs through the town of Errol, New Hampshire, where they were delayed by low water. The Court held that these logs were merely passing through New Hampshire and were already in the course of commercial transportation. Therefore, they enjoyed constitutional protection from taxation. 116 U.S. at 525, 6 S.Ct. 475.

The second crop of logs had been cut in New Hampshire and brought to Errol to be floated out of state. The logs were floated in and placed on the banks of a tributary of the Androscoggin River awaiting commencement of the journey. The Court held that the logs had not yet begun their journey and were not constitutionally protected:

> There must be a point of time when [the logs] cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems

> to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State.

116 U.S. at 525, 6 S.Ct. at 477.

Sumitomo's logs are in the same position as the second collection of logs in *Coe*. They were cut in the forests of Washington state and taken to an entrepot within that state, the port of Olympia, to await shipment out of the state. They had neither been committed to a common carrier for export, A. G. Spalding & Bros. v. Edwards, 262 U.S. 66, 43 S.Ct. 485, 67 L.Ed. 865 (1923), nor loaded upon the ship that would take them to Japan, Richfield Oil Corp. v. State Board, *supra*.[3] Neither *Spalding*, *Richfield*, nor any other case of which we are aware, suggests that *Coe* is no longer controlling in cases presenting similar facts. To the contrary, both *Richfield* and Empresa Siderurgica, S.A. v. Merced County, *supra*, cite *Coe* approvingly and rely on its standard. Any doubt of the viability of Coe v. Errol has been dispelled by the language in *Kosydar*.[4]

3. Although *Spalding* and *Richfield* involved sales taxes, each result explicitly depended on the point at which the goods commenced their journey and thereby became "exports."

4. Noting that the Court had adhered to the basic principle of Coe v. Errol for the nearly 90 years since that case was decided, Kosydar v. National Cash Register Co., supra, at . . , 94 S.Ct. 2108, Justice Stewart, writing for a unanimous Court, stated:

> It may be said that insistence upon an actual movement into the stream of export in the case at hand represents an overly wooden or mechanistic application of the *Coe* doctrine. This is an instance, however, where we believe that simplicity has its virtues. The Court recognized long ago that even if it is not an easy matter to set down a rule determining the moment in time when articles obtain the protection of the Import-Export Clause, "it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question." *Coe*, *supra*, 116 U.S. at 526, 6 S. Ct. at 478.

Id. at . . , 94 S.Ct. at 2113.

Thus, under *Coe*, Sumitomo's logs were not "exports" while stored at the port awaiting shipment.

Sumitomo makes two counter arguments to support its position. First, it argues that the quality of the logs, the contractual and financial arrangements covering them, and Sumitomo's past practices indicated with reasonable certainty that the logs would be exported. Thus, there was no reasonable probability that the logs would be diverted to the domestic market after escaping taxation.

There is some case law support for the conclusion that certainty of exportation is a criterion for determining whether exportation has begun. In *Richfield* the Court concluded that oil became an "export" when loaded on a ship bound for a foreign destination, even though the ship was not a common carrier. The Court reasoned that the theoretical possibility of diversion to the local market should be overlooked because it was reasonably certain that the oil was going to be delivered outside the United States. 329 U.S. at 82-83, 67 S.Ct. 156.

The reliance on the certainty of export in *Richfield* was, however, used merely to excuse the fact that the ship was not a common carrier. Certainty of export evidenced by financial and contractual relationships does not by itself render goods "exports" before the commencement of their journey abroad. Empresa Siderurgica, S.A. v. Merced County, *supra* at 156-157, 69 S.Ct. 995.[5] Thus even if we "accept as fact the [appellee's] assurances that the prospect of eventual exportation here was virtually certain," the immunities of the Import-Export Clause are unavail-

5. *See also* Cornell v. Coyne, 192 U.S. 418, 24 S.Ct. 383, 48 L.Ed. 504 (1904). *Cornell* involved Article I, Section 9, Clause 5, which prohibits Congress from levying a tax on goods "exported from any State." But this difference is irrelevant for determining the point at which the exportation process begins. Empresa Siderurgica, S.A. v. Merced County, *supra* at 156 & n. 2, 69 S.Ct. 995. Richfield Oil Corp. v. State Board, *supra* at 83, 67 S.Ct. 156.

able absent an actual entrance of the appellee's logs into the export stream. Kosydar v. National Cash Register Co., *supra*, at ....., 94 S.Ct. 2108.[6] Since nothing in *Richfield* undermines *Coe* on the question of when the journey begins, the fact that diversion to the domestic market was unlikely does not remove Sumitomo's logs from the "entrepot" standard *Coe* announced.

Second, Sumitomo argues that Carson Petroleum Co. v. Vial, 279 U.S. 95, 49 S.Ct. 292, 73 L.Ed. 626 (1929), controls this case and undermines the validity of *Coe*. In *Carson*, oil was being transported from Texas, Oklahoma, and Kansas to Europe. The journey consisted of railroad transportation through Louisiana to a location near New Orleans. There the oil was transferred to shore tanks to await the arrival of ships for the ocean voyage. Shore based storage tanks were used to avoid the necessity of ships being delayed awaiting the arrival of sufficient oil to comprise a full load, and all oil stored was awaiting the arrival of a ship for transportation to Europe. The Court held that Louisiana could not tax the oil being stored awaiting an available vessel.

Sumitomo argues that, as with the oil in *Carson*, its logs were being stored at the port only to await the arrival of a ship to transport them to Japan. This is true. But unlike the oil in *Carson*, Sumitomo's logs had not been traveling interstate prior to their storage at the Port of Olympia. *Carson* involved the interruption of an interstate/international journey that had admittedly begun long before the oil reached New Orleans. The Court held merely that when such a journey is interrupted by a geographically necessary change in transportation modes, reasonable delays

6. The likelihood of eventual exportation was probably even greater in *Kosydar* than under the facts presented in this case. The taxpayer in *Kosydar* was engaged in the manufacture of business machines, and its wholly separate international division did not commence manufacture until actual receipt of foreign orders. The machines produced were designed for the peculiar foreign market, using unique keyboards, characters, and decimal point placement, and quite often were designed to utilize the electric supply of the foreign country which often differs from that in stardard use in this country. Each machine so constructed was eventually exported, and none ever re-entered the domestic market.

and inventories to facilitate that change do not cause the goods to cease being "exports" or "goods in interstate commerce." Thus, *Carson* involved a situation similar to the first group of logs in *Coe* which were delayed by low water during their journey through New Hampshire.

Sumitomo's logs, on the other hand, were not interrupted on a journey through Washington from another state to a foreign destination. They were, like the second group of logs in *Coe*, products of Washington taken to an entrepot from surrounding areas within the state.[7] Thus, under the holding of *Coe* they had not yet become "exports" falling under the protection of Article I, Section 10, Clause 2.

It is true that *Carson* did not explicitly distinguish the oil delayed at the port from the logs collected at the entrepot in *Coe* on the basis that the former had begun its journey in another state. Thus, it is not unreasonable for Sumitomo to contend that *Carson* casts doubt on the validity of *Coe*. But since *Coe* has been explicitly approved and its standard relied on in *Richfield*, *Empresa Siderurgica*, and most recently, in *Kosydar*—all decided after *Carson*—Sumitomo's interpretation of *Carson* must be rejected.

The logs upon which Thurston County levied its *ad valorem* tax had not yet become "exports" entitled to the protection of Article I, Section 10, Clause 2, of the United States Constitution. The judgment of the district court is reversed, and the case is remanded for entry of judgment in favor of appellant county.

7. Although we rely on the difference between out-of-state and in-state goods delayed at the water's edge, we do not hold that this distinction is necessarily conclusive in all factual situations. Specifically, we infer no holding concerning the situation where goods are consigned to a common carrier within a state for out-of-state shipment but are delayed at the interface of two modes of transportation prior to leaving the state while still within the control of the common carrier. *See* Empresa Siderurgica v. Merced County, *supra* at 156.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUMITOMO FORESTRY CO., LTD., OF JAPAN, *Plaintiff-Appellee,* v. THURSTON COUNTY, WASHINGTON, a legal subdivision of the State of Washington, *Defendant-Appellant.*	Filed Jan. 20, 1975 Clerk U.S. Court of Appeals No. 72-2395 ORDER

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and WILLIAMS, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hufstedler and Wright have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

SUMITOMO FORESTRY COMPANY, LTD., *Petitioner,* v. THURSTON COUNTY, WASHINGTON	No. A-837

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 20, 1975.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 15th day of April, 1975.

JUN 16 1975

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1457

SUMITOMO FORESTRY CO., LTD.,
of Japan,
Petitioner,

v.

THURSTON COUNTY, WASHINGTON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PATRICK D. SUTHERLAND
Thurston County Prosecuting Attorney
WILLIAM L. BRITTON
Special Deputy Prosecuting Attorney
Counsel for Respondent

Office and Post Office Address:
201 Evergreen Plaza Building
711 Capitol Way
Olympia, Washington 98501

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

	Page
I. Opinions Below	1
II. Jurisdictional Statement	2
III. Constitutional Provisions	2
IV. Question Presented	2
V. Statement of the Case	2
VI. Argument	3
VII. Conclusion	8

TABLES OF AUTHORITY

Table of Cases

Carrington Co. v. Department of Revenue, 84 Wn.2d 444, 527 P.2d 74 (1974) 3, 4

Carson Petroleum Co. v. Vial, 279 U.S. 95, 73 L. Ed. 626, 49 S. Ct. 292 (1929) 7, 8

Coe v. Errol, 62 N.H. 303 (1882), *aff'd*, 116 U.S. 517, 29 L. Ed. 715, 6 S. Ct. 475 (1886) 5-6

Kosydar v. National Cash Register Co., 417 U.S. 62, 40 L. Ed. 2d 660, 94 S. Ct. 2108 (1974) 6, 7, 8

Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946) 4-5

Tacoma v. General Metals of Tacoma, Inc., 84 Wn.2d 560, 527 P.2d 1314 (1974) 3-4, 5

Statutes

28 USC § 1254 2

Other Authority

Rule 19(1)(b) 3

Rule 24(1) 1

Tacoma City Rule 177 5

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1457

SUMITOMO FORESTRY CO., LTD.,
of Japan,
Petitioner,

v.

THURSTON COUNTY, WASHINGTON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COMES NOW Thurston County, State of Washington, a municipal corporation, (hereinafter "Thurston County") and, pursuant to Rule 24(1), herewith respectfully submits its Brief in Opposition to Petition for Writ of Certiorari in the above-entitled matter.

I.

OPINIONS BELOW

The Respondent accepts the recitation of the opinions below as contained in the Petitioner's Petition.

II.

JURISDICTIONAL STATEMENT

Jurisdiction in the Supreme Court to review the decision for the Court of Appeals for the Ninth Circuit by Writ of Certiorari is given by 28 USC Section 1254.

III.

CONSTITUTIONAL PROVISIONS

Respondent accepts the Statement of Constitutional Provisions as contained in the Petitioner's Petition for Writ of Certiorari.

IV.

QUESTION PRESENTED

Respondent accepts the question presented as contained in Petitioner's Petition for Certiorari in the above-referenced matter.

V.

STATEMENT OF THE CASE

The Statement of the Case contained in the Petitioner's Petition or Writ of Certiorari on file in the above-entitled matter includes the petitioner's arguments with respect to its petition. Accordingly, the Respondent, not wishing to accept the argument of Petitioner as being facts of the case, respectfully rejects the Statement of the Case contained in the Petition on file herein.

This matter was presented to the United States District Court, Western District of Washington, at Seattle, upon an agreed Statement of Facts. That agreed Statement is essentially contained as the Findings of Fact, in the Findings of Fact and Conclusions of Law made and entered by

the United States District Court. A copy of those findings is appended (Appendix A) to the Petitioner's petition on file herein.

It is respectively submitted that those findings alone constitute the statement of the case before the court in the above-entitled matter.

VI.

ARGUMENT

The instant petition is addressed to the sound discretion of the Supreme Court; Petitioner seeks review by certiorari, under Rule 19(1)(b), and the only portion of that Rule which might apply to the above-entitled matter is that portion providing for review by this Court where a Court of Appeals "has decided a Federal question in a way in conflict with applicable decisions of this Court." There is no suggestion in the petition on file herein that the Court of Appeals has decided this case in conflict with the decision of another such court, or that the Court of Appeals touched upon a question of state law, or that the Court of Appeals has so far departed from the accepted course of judicial proceeding as to call for an exercise of this Court's power of supervision. Thus the Petitioner suggests that this Court exercise its discretion in its favor, granting certiorari, based solely upon the Petitioner's disagreement with the conclusions of law expressed by the Court of Appeals.

Petitioner does suggest, however (Petition, pages 15-16), that the decision of the Court of Appeals is in conflict with two recent decisions of the Supreme Court of the State of Washington: *Carrington Company v. Department of Revenue*, 84 Wn.2d 444, 527 P.2d 74 (1974), and, *Tacoma v.*

General Metals of Tacoma, Inc., 84 Wn.2d 560, 527 P.2d 1314 (1974). Respondent's counsel is advised that the *Carrington* opinion is before this Court upon application for certiorari, under this Court's Cause No. 74-1238. It thus appears that any confusion raised by the *Carrington* opinion can be directly resolved by this Court, without resort to a grant of certiorari in the above-captioned matter. It also appears that the decisions are distinguishable. In *Carrington*, the goods which the state sought to tax had been purchased for the sole purpose of satisfying a government contract, calling for the export of the goods to Southeast Asia. The goods were taxed after they had been loaded aboard trucks and transported to a Tacoma packing facility. The sole purpose of the packing facility was to crate the goods as a part of their export journey. Materials were held at the packing facility for seven or eight days before being loaded aboard a ship or airlifted out. It thus appears that the goods in *Carrington* were continually on their international journey at the time the tax was assessed. The logs in the case at bar remained at a storage facility for an average of forty-five days; individual logs might remain at the storage facility for up to one year. No function was performed at the storage facility which in any way prepared the logs for their shipment. Rather, while at the storage facility in the case at bar, the logs merely sat immobile, awaiting a ship's ultimate arrival.

In the *General Metals* case, the City of Tacoma attempted to collect a tax based upon the sale of goods by a domestic supplier to a licensed exporter. It was the sale itself that the city sought to tax. The *General Metals* case thus falls within the Rule established by this Court in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S.

69, 91 L. Ed. 80, 67 S. Ct. 156 (1946). Moreover, the Washington Supreme Court further held that the tax sought to be collected by the City of Tacoma in *General Metals*, fell within a prohibition contained in Tacoma City Rule 177; the *General Metals* decision thus rests upon a construction of state law. The case at bar has no basis in state law for the determination reached below; moreover, the tax imposed in the case at bar was an *ad valorem* tax upon goods found to be in storage at the annual inspection date. There was no tax assessed by the Respondent upon the basis of volume of sales conducted.

In the case at bar, Sumitomo contracted to purchase logs from several suppliers with the anticipation of exporting those logs to Japan. The suppliers harvested logs meeting contract specifications at innumerable locations in the vicinity of the Port of Olympia. As the logs were harvested, they were trucked to the storage facility near the Port of Olympia, there they were sorted by species, graded and piled. From that time, until they were eventually trucked to dockside for loading aboard ships, nothing was done to the logs, nor were the logs moved. The logs had not been collected and then shipped en masse to the Port of Olympia storage facility; rather, their first point of collection was at the Port of Olympia storage facility. The logs in the case at bar are thus indistinguishable from the logs held taxable in *Coe v. Errol*, 62 N.H. 303 (1882), *aff'd*, 116 U.S. 517, 29 L. Ed. 715, 6 S. Ct. 475 (1886). Two classes of logs were involved in *Coe*. The first of these was described as follows by the New Hampshire Supreme Court [62 N.H. 303, 311-312]:

> "The petitioner ° ° ° asks for an abatement of the taxes assessed by the defendant town ° ° ° upon a lot

> of logs therein * * * which had been cut and drawn there during the preceeding winters from Wentworth's Location in this state * * *. It is * * * admitted to be true, that at the time the assessments were made the 'logs were being taken by the owners on the way to Maine, to be manufactured and sold;' and the claim of petitioner is, that they were not subject to taxation in Errol 'for the reason that they were in transit to market from one state to another * * *.'"

As to these logs the tax was upheld by the New Hampshire Supreme Court, and the United States Supreme Court affirmed, saying [116 U.S. 517, 525, 29 L. Ed. 715, 718, 6 S. Ct. 475, 477]:

> "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or on a line of a railroad, such products are not yet exports, nor are they in the process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state, to the state of their destination."

There is no legerdemain which will distinguish the logs in the case at bar from those held taxable in *Coe*. The logs held taxable in *Coe*, and those in the case at bar, had each been collected prior to commencement of their ultimate export journey. Had the logs in the case at bar been collected elsewhere, and then shipped en masse to the Port of Olympia storage facility, then the logs would have fallen within the second class of logs discussed in *Coe*. Thus *Coe* must govern the case at bar, unless *Coe* has since been overruled.

Any doubt with respect to the continued validity of the holding in *Coe* has been recently dispelled by this Court in *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 40 L. Ed. 2d 660, 94 S. Ct. 2108 (1974). In *Kosydar*, this

Court dealt with the taxability of certain business machinery, manufactured exclusively for the export market, and where ultimate export appeared virtually certain. This Court rejected any theory relating to certainty of export, and reaffirmed the principle that goods must actually enter the export stream of commerce before the immunity of the Import-Export Clause would attach. [417 U.S. 62, 71, 40 L. Ed. 2d 660, 667, 94 S. Ct. 2108, 2113-2114]:

> "It may be said that insistence upon an actual movement into the stream of export in the case at hand represents an overly wooden or machanistic application of the *Coe* doctrine.
>
> * * *
>
> "Our prior cases have determined that the protections of the Import-Export Clause are not available until the article at issue begins its physical entry into the stream of exportation. We find no reason to depart from that settled doctrine."

In its Petition (pages 14-15), the Petitioner objects to certain language found in the opinion of the court below. Specifically, Petitioner objects to the mention of a prior interstate journey, involved in the case of *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 73 L. Ed. 626, 49 S. Ct. 292 (1929). In *Carson*, oil had first been collected from the production area and gathered at a refinery. After refining, the oil had been shipped to a port in Louisiana, for its ultimate transshipment overseas. In *Carson*, this Court correctly held that the journey in international commerce had begun when the refined fuel left the refinery; its incidental storage at the port, to facilitate unloading from railway tank cars and onloading onto ships, did not constitute a break in a continuous journey. Petitioner suggests that the opinion of the court below is based upon a theory that an interstate

journey must first commence, before the constitutional tax immunity attaches. The court below mentioned the interstate character of the journey involved in *Carson*. By its final footnote (footnote No. 7), the court dispells any notion that its ruling with respect to the *Carson* case relied upon the interstate character of the journey there involved. Petitioner suggests that the decision of the court below might have been different, had the logs commenced their international journey from a point outside the state of Washington. Surely, the decision of the court below would have been different in such a case; similarly, it is equally certain that the decision of the court below would have been different had the logs commenced their international journey, prior to the imposition of the tax, from a point within the state of Washington. The decision of the court below was correctly based upon the fact that the logs in question had simply not begun their journey; they had been merely collected for the purpose of eventually beginning their journey. The decision of the court below is clear, and in all respects, correct.

VII.
CONCLUSION

It is respectfully submitted that the decision of the court below correctly applies the principles established by this Court. Further, it is respectfully submitted that this Court ought not to grant certiorari to consider a question recently decided by this Court in *Kosydar*, and correctly applied

in the court below. Thurston County prays that this Court deny certiorari in the above-entitled cause.

Respectfully submitted,

PATRICK D. SUTHERLAND
Thurston County Prosecuting Attorney

WILLIAM L. BRITTON
Special Deputy Prosecuting Attorney
Counsel for Respondent

Supreme Court, U. S.
FILED
OCT 1 1975

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1457

SUMITOMO FORESTRY CO., LTD., OF JAPAN,
Petitioner,
v.
THURSTON COUNTY, WASHINGTON,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS G. HOLCOMB
THOMAS G. HOLCOMB, JR.
Counsel for Petitioner

Office and Post Office Address:
2325 Financial Center
Seattle, Washington 98161

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1457

SUMITOMO FORESTRY CO., LTD., OF JAPAN,
Petitioner,

v.

THURSTON COUNTY, WASHINGTON,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COMES NOW Sumitomo Forestry Co., Ltd. of Japan, Petitioner herein (hereinafter "Sumitomo"), and pursuant to Rule 24(5) submits this Supplemental Brief.

On May 19, 1975, this Court denied a Petition for a Writ of Certiorari in the case of *Carrington Co. v. Department of Revenue,* 84 Wn.2d 444, P.2d 74, *cert. den.,* 421 U.S. ....., 44 L. Ed. 2d 470 (By order dated May 19, 1975, Supreme Court Cause 74-1238). Sumitomo submitted its

original Petition and Brief on May 20, 1975 and was unaware that the Petition in *Carrington* had been denied. It is respectively submitted that this denial requires that the Petition herein be granted.

The *Carrington* case is the latest decision by the highest court in the State of Washington interpreting Article I, Section 10, Clause 2 of the Constitution. It now stands as the settled law in the State of Washington. The reasoning of the Washington Court and the resulting decision in *Carrington* is directly contrary to the decision of the Ninth Circuit Court of Appeals in the case at bar.

In *Carrington*, the taxpayer sold certain goods and materials to the United States Government. By the terms of the sale, the taxpayer loaded the goods aboard trucks in Seattle and they were transported a distance of approximately thirty miles to Tacoma. At Tacoma, the goods were unloaded and inspected for compliance with specifications. The goods were then packed for shipment and transported to their overseas destination by ocean going vessel or by airplane. The goods were delayed in Tacoma for a period of 7 or 8 days. The Washington Supreme Court held that when the goods were loaded aboard the trucks in Seattle, the export journey began and, further, the packing in Tacoma was not a break in the stream of export, but in furtherance of it.

In the case at bar, the District Court held that the export journey commenced when the logs were put aboard the trucks in the forest and that the accumulation of the logs at the Port was not a break in the export journey, but in furtherance of it. While the District Court did not have the *Carrington* decision before it, the factual and legal

parallels are obvious. The panel of the Ninth Circuit Court of Appeals reversed the District Court in the instant case. The *Carrington* decision was announced two days after the decision by the Ninth Circuit Court of Appeals in the case at bar. However, on Sumitomo's Petition for Rehearing, the obvious conflict between the decision of the State court and the Ninth Circuit Court of Appeals was brought to the attention of the Court but a Rehearing was denied.

The decision of the Ninth Circuit Court of Appeals in the case at bar clearly conflicts with the *Carrington* decision. As in the *Carrington* case, Sumitomo's logs were transported by truck to the Port. As in *Carrington*, the logs were taken to a point where the change in the mode of transportation required an accumulation of the goods. In *Carrington*, the goods were inspected and packed for shipment at the site of the interruption, while Sumitomo's logs had previously been inspected and nothing remained to be done except put the logs aboard ship.

Finally, the *Carrington* decision struck down a tax levied on the domestic seller, while in the case at bar, the taxpayer is the foreign exporter. If *Carrington* was the controlling precedent, the tax on Sumitomo's logs would clearly be unconstitutional.

The original Petition states the grounds upon which this Court may grant review of the Ninth Circuit Court of Appeals decision. It is submitted that the recent refusal to grant certiorari in *Carrington* requires that certiorari be granted in the case at bar. If this Court refuses to grant certiorari in the case at bar, both state and federal courts in the State of Washington would be in the anomalous position of choosing between two irreconcilable decisions

rendered at almost the same time in two distinct jurisdictions. Only confusion can result from such a situation. The Courts must receive some guidance from the Supreme Court of the United States. This Court must grant the Petition in this case and resolve the obvious conflict.

Respectfully submitted,

THOMAS G. HOLCOMB
THOMAS G. HOLCOMB, JR.
Counsel for Petitioner